

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 3, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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No. 96-2922

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

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**CONVERSE AND LOVINA SMITH, JOSEPH AND LYNDE  
MARTINO, JAMES LEIBSOHN, MAURICE AND SANDRA  
MCSWEENEY, JAMES AND GILDA SHELOW AND  
RICHARD AND DIANE BURGESS,**

**PLAINTIFFS-APPELLANTS,**

**ROBERT AND BARBARA ELSNER, HERBERT S. AND JILL  
HEAVENRICH, SUZANNE S. AND MICHAEL HUPY,  
WILLIAM AND NICOLE TEWELES, RICHARD AND  
STEPHANIE MELROSE, JOSEPH AND ELLEN CHECOTA,  
JACQUES AND BARBARA HUSSUSSIAN, STEVEN AND  
KATHLEEN SEIDEL, THOMAS L. AND GABRIELE A.  
ESCHWEILER, GEORGE AND ANGELA JACOBI, JAMES L.  
AND SUE J. WIECHMANN, JAMES C. AND CATHY ROWE,  
NORM AND SUSAN BALTHASAR AND MARTIN AND  
CRISELDA ROSS DUKLER,**

**PLAINTIFFS,**

**v.**

**WISCONSIN INSTITUTE FOR TORAH STUDY, INC., CITY  
OF MILWAUKEE AND CITY OF MILWAUKEE BOARD OF  
ZONING APPEALS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Converse and Lovina Smith, Joseph and Lynde Martino, James Leibsohn, Maurice and Sandra McSweeney, James and Gilda Shellow, and Richard and Diane Burgess, collectively known as the Citizens for North Point Historic Preservation, appeal a judgment upholding the City of Milwaukee Board of Zoning Appeals' determination that the Wisconsin Institute for Torah Study, Inc. (WITS), may use and expand buildings on its property for student residences. The trial court concluded that the board's interpretation of the MILWAUKEE, WIS., BUILDING & ZONING CODE OF ORDINANCES was entitled to great deference. Although we afford a lesser degree of deference than the trial court, we nevertheless uphold the board's determination that dormitories are an accessory use to a school in a single-family residential district.

The parties do not dispute the underlying facts. Their disagreement lies in the board's application of the ordinance provisions to the particular facts. WITS owns a five-acre property in the North Lake Drive Historic District in Milwaukee. On the property, WITS operates a yeshiva, which is a religious education immersion program incorporating the study and practice of orthodox religion. The program includes an accredited general studies program for the high school age boys. A necessary component of yeshiva attendance is living on the premises in order to fully participate in the range of religious instruction and practice. The students, all male, sleep in dormitories, eat in group facilities, and

attend classes and worship services all on the same property. The yeshiva has a current enrollment of approximately 120 students. WITS seeks construction of an additional building on the property that would include a dormitory for its students.

Although the property is located in a single-family residential district, it has not been utilized as a private single-family residence since 1948, when it was sold by its original owner and builder, Henry Thompson, to the Convent of Our Lady of the Cenacle, a Catholic order of nuns. During its ownership, the convent obtained a permit to convert the residence into a convent and retreat house, erect a one-story addition for use as a chapel, and add a wing for bedrooms and a meeting hall. In 1974, the convent sold the property to the Western Province of the Sisters of St. Mary, an Episcopalian order that continued to use the property as a convent and retreat house.

In 1984, WITS purchased the property and obtained an occupancy permit for use as a "Synagogue and School (Religious) - nonprofit - Dormitory." Robert Shaft, a permit and plan examiner for the Department of Building Inspection, granted a certificate of occupancy after determining that WITS' use was a continuation of the prior legal nonconforming use. At that time, thirty-six students attended the yeshiva. Between 1984 and 1995, enrollment continued to increase. In 1991, WITS converted an existing coach house for student residence, and in 1994 it began to plan new construction to accommodate an enrollment of 160 students.

The citizens filed an action for declaratory judgment and injunction on April 2, 1996. At the expedited trial, the court gave great weight to the board's interpretation of the code and upheld its determination that WITS operated a

school within the meaning of ORD. ch. 295 and that a dormitory, as an accessory use to a school, was a permitted use. This appeal by the citizens followed.

The main issue on appeal is whether WITS' present and proposed use of the property to house students attending yeshiva is permissible under ch. 295 of the code. The citizens contend the clear and unambiguous language of the code prohibits dormitories in single-family residential districts. They reason that because dormitories are listed as "permitted uses" in specific districts, such as multi-family and certain commercial districts, but are not listed at all in single-family residential districts, either as permitted or special uses, then by definition, the use is prohibited in the district where it is not listed. The board and trial court were not persuaded, nor are we.

Ordinarily, interpretation of an ordinance<sup>1</sup> is a question of law we review de novo. *Kannenbergh v. LIRC*, 213 Wis.2d 373, 384, 571 N.W.2d 165, 171 (Ct. App. 1997) (citing *UFE, Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996)). The purpose of ordinance interpretation is to give effect to the intent of the legislative body. See *Zimmerman v. DHSS*, 169 Wis.2d 498, 504, 485 N.W.2d 290, 292 (Ct. App. 1992). If the meaning of the ordinance is plain from the language, then we apply the ordinance to the facts. *Village of DeForest v. County of Dane*, 211 Wis.2d 802, 807-08, 565 N.W.2d 296, 299 (Ct. App. 1997). Only when the ordinance is ambiguous do we resort to legislative history or matters extrinsic to the language of the ordinance. See *id.* On review, we are not bound by the board's interpretation. In certain situations, however, we may

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<sup>1</sup> The rules of statutory construction apply to the interpretations of ordinances as well. *Marris v. City of Cedarburg*, 176 Wis.2d 14, 32-33, 498 N.W.2d 842, 850 (1993).

defer to the board's interpretation of an ordinance. *Marris v. City of Cedarburg*, 176 Wis.2d 14, 32-33, 498 N.W.2d 842, 850 (1993).

The citizens argue that we owe no deference to the board's determination because the issue of whether a dormitory is an accessory use is one of first impression for the board. In support of their argument, they point to evidence of a disagreement between the commissioner of building inspection and an assistant regarding whether dormitories were prohibited; a zoning administrator supervisor's apparent change of mind that the department's long-standing position was that dormitories were allowed as accessory uses to schools; and the fact that the commissioner sought an opinion from the city attorney on the issue.

The citizens urge this court to conclude under a de novo review that, according to its unambiguous language, the code does not allow dormitories in single-family districts. They reason that WITS is a specialized boarding school and not a school within the meaning of the code, and that WITS dormitories would be detrimental to the character of the neighborhood. Thus, they conclude that a dormitory is not an appropriate accessory use.

We first determine our appropriate standard for reviewing the board's determination. There are three levels of deference given to an agency's interpretation: great weight, due weight, or no weight. We accord great weight to the agency's interpretation when:

- (1) the agency was charged by the legislature with the duty of administering the statute;
- (2) ... the interpretation of the agency is one of long-standing;
- (3) ... the agency employed its expertise or specialized knowledge in forming the interpretation; and
- (4) ... the agency's interpretation will

provide uniformity and consistency in the application of the statute.

**Kannenberg**, 213 Wis.2d at 385, 571 N.W.2d at 171. We also give great weight to the agency's interpretation if it "is intertwined with factual determinations or with value or policy determinations." *Id.* (citing **Bernhardt v. LIRC**, 207 Wis.2d 294, 305, 558 N.W.2d 874, 878 (Ct. App. 1996)). Under the great weight standard, we uphold the agency's reasonable interpretation if it is not contrary to the clear meaning of the statute, even if we conclude another interpretation is more reasonable. **Kannenberg**, 213 Wis.2d at 385, 571 N.W.2d at 171-72.

We grant due weight to an agency's interpretation when the agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than the court to make judgments regarding the interpretation of the ordinance. *Id.* at 385, 571 N.W.2d at 171 (citing **UFE, Inc.**, 201 Wis.2d at 286, 548 N.W.2d at 62). Under the due weight standard, we uphold the agency's reasonable interpretation if it comports with the purpose of the statute and we conclude another interpretation is not more reasonable. *Id.* at 385, 571 N.W.2d at 171-72.

Finally, we show no deference to the agency's interpretation when the issue before the agency is one of first impression or the agency's position has been so inconsistent as to provide no real guidance. *Id.* at 385-86, 571 N.W.2d at 172. In that situation, we employ de novo review. *Id.*

We conclude the appropriate standard of review is to grant due weight to the board's determination that dormitories are an accessory use to WITS' school. We reject the citizens' conclusion that whether a dormitory is an accessory use to a school is an issue of first impression for the board. Although the board

has not previously addressed the specific question whether on-site dormitories are an accessory use to a school located in a single-family residential district, that is not to say it has no experience in evaluating uses and applying the accessory use provisions of the code to reach a decision. "Even though an agency never interpreted a particular statute against facts of first impression, because the agency has prior experience in interpreting the statute, the agency's decision will be accorded due weight or great bearing." *Bunker v. LIRC*, 197 Wis.2d 606, 612-13, 541 N.W.2d 168, 171 (Ct. App. 1995). Although the citizens point to differences of opinion within the department regarding the code's interpretation, the record shows the commissioner and the board adopted the city attorney's opinion. There is no evidence of inconsistent application of the accessory use provision that would lead us to believe the agency's position is inconsistent to the point of not providing reliable guidance. Although the board has not previously addressed the specific question of whether on-site dormitories are an accessory use to a school located in a single-family residential district, it nevertheless has the experience and expertise in evaluating uses and applying the accessory use provisions of the code to reach a decision.<sup>2</sup> *See id.*

The purpose of the ordinances, as set forth in ORD. § 295-3, is to promote land use and development that is consistent with the City's comprehensive plan. The Commissioner of Building Inspection, Lee C. Jensen, is

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<sup>2</sup> But for the fact that we cannot characterize the board's determination as one of long-standing, we would be able to apply the great weight standard because the board is charged by the legislature with the duty of administering the ordinance, *see* ORD. § 295-1; the agency did employ its expertise and specialized knowledge regarding the use of WITS property since 1984; and the agency's interpretation will provide uniformity and consistency in the application of the ordinance. In addition, the City's determination that WITS may have dormitories on its property as an accessory use is intertwined with factual determinations or with value or policy determinations. *See Kannenberg v. LIRC*, 213 Wis.2d 373, 385, 571 N.W.2d 165, 171 (Ct. App. 1997).

charged with enforcing the provisions of ch. 295. He testified that he would rule that a dormitory is an accessory use to a school or college and that such use could be expanded or increased. The City's position is that the code plainly and unambiguously permits dormitories as accessory uses to schools in its single-family residential districts.

We agree with the board's conclusion that a building to house students attending the yeshiva is an accessory use to WITS' principal use as a school. Each district lists "permitted uses" and "special uses." The code allows churches, elementary and secondary schools, and colleges as permitted uses in the six single-family residential districts created in ORD. § 295-110. *Id.* at § 295-112(3)(a)-(c). Accessory uses that are not detrimental to the residential character of the neighborhood are also allowed as permitted uses in single-family residential districts. *Id.* at § 295-112-17.

An accessory building is defined as: "A building on the same lot as a principal structure and customarily incidental to the principal structure or use." *Id.* at § 295-7, subch. 1. School, elementary or secondary, is defined as: "A public, parochial or private school which provides an educational program for one or more grades between kindergarten and grade 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school or high school." *Id.* at § 295-7-148. As the city attorney noted in its opinion to the board:

In this instance we believe that the residential/"dormitory" utilization of a portion of its property by WITS serves an educational purpose and is therefore part of the school, which is a permitted principal use of the property, as well as a use which is inherently an "accessory use" under the Zoning Code.

We agree that the language of the code permits accessory uses in single-family residential districts. Under the due weight standard of review, we uphold the board's interpretation that WITS may use dormitories to house students as an accessory use to its yeshiva. Its interpretation comports with the purpose of the statute to promote land use consistent with the City's plan.

Next, the citizens contend that (1) WITS is a specialized boarding school, and not a school within the definition of ORD. § 295-7-148; and (2) even if WITS is a school within the meaning of the code, a dormitory is detrimental to the residential character of the neighborhood and therefore not permitted as an accessory use. These claims amount to challenges to the board's factual determinations.

We accept the board's findings of fact as long as they are supported by substantial evidence. See *Hamilton v. DILHR*, 94 Wis.2d 611, 617, 288 N.W.2d 857, 860 (1980). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* It is not necessary that the evidence be subject to no other reasonable, equally plausible interpretation. *Id.*

Here, the record shows that WITS has occupied and operated its program since 1984 under a permit designating the use of its property as a nonprofit synagogue, religious school and dormitory. The yeshiva includes an accredited high school program. The trial testimony demonstrated that the students are engaged in study and prayer from approximately 7:30 a.m. until 7 p.m., with additional study programs continuing into the later evening hours. We conclude the board's finding that WITS operates a school within the definition of the code is supported by substantial evidence.

The record also shows that the WITS property is located on a five-acre parcel of land and is substantially set back from the road. There was testimony that a next-door neighbor had no idea of the number of students living at WITS. In addition, the school imposes a curfew on students. The school population observes the Sabbath from sundown on Friday until sundown on Saturday, and during that time no electricity or automobiles are used. Based on this evidence, we also conclude that the board's finding that WITS dormitory use is not detrimental to the residential character of the neighborhood is supported by substantial evidence.

The citizens also contend the trial court erred by applying a great weight deference to the board's determination. However, we review the decision of the board, not of the trial court, *Bunker*, 197 Wis.2d at 611, 541 N.W.2d at 170, and, therefore, need not address this issue further. In addition, we decline to address WITS' additional argument that an interpretation of the code that prevents dormitories at its school violates WITS' rights to free exercise of religion and equal protection. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (Because we decide the case on one issue, we need not address others.).

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

